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No. 02-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

CHRISTINE A. CUMMINGS; JANET TAYLOR DARVAS; RICHARD K. DEHART; CHRISTOPHER GARBANI; PATRICIA A. MCCUMSEY; DANIEL NOWALIS; CLAUDIA STEWART, AND THE CLASS THEY REPRESENT,

Petitioners,

v.

KATHLEEN CONNELL; MARTY MORGENSTERN; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF *CERTIORARI*

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April 2003

108 pp

QUESTIONS PRESENTED

I. Are public officials who seize agency fees in violation of "the constitutional requirements for the . . . collection of agency fees," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986), immune from liability under 42 U.S.C. § 1983?

II. Do public employees possess standing to challenge, as void as against federal constitutional law and public policy, the legality of provisions of the collective bargaining agreements governing their terms and conditions of employment?

III. May public officials agree to be indemnified by a labor union for their liability for violating nonunion public employees' constitutional rights when they seize compulsory union fees in violation of this Court's decision in *Hudson*?

IV. Is a union which fails to satisfy "the constitutional requirements for the Union's collection of agency fees," *Hudson*, 475 U.S. at 310, entitled to retain agency fees seized before compliance or, in the alternative, the nonchargeable portions of the fees seized?

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings in the court whose judgment is sought to be reviewed other than those named in the caption.

In addition to those named in the caption, Mona Yassa, an individual employee of the State of California, was initially a party to the proceedings in the District Court. Record ("R.") 1: Complaint, ¶ 6. She was voluntarily dismissed from the action when it was discovered that she was a voluntary union member during the relevant period at issue in this case. R. 55 & 56.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioners Christine A. Cummings, Janet Taylor Darvas, Richard K. DeHart, Christopher Garbani, Patricia A. McCumsey, Daniel Nowalis, Claudia Stewart, and the class they represent, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on 9 January 2003.

OPINIONS BELOW

The panel opinion sought to be reviewed (Appendix ("App.") A at 1a) is reported at 316 F.3d 886 (9th Cir. 2003). The opinions and orders of the United States District Court for the Eastern District of California on Respondent CSEA's Motion to Reconsider or Amend Judgment (App. C at 24a), and on Petitioners' and Respondents' Cross-Motions for Summary Judgment (App. E at 33a), are reported at 177 F. Supp. 2d 1060 (E.D. Cal. 2001). The amended judgment (App. B at 23a) and original judgment (App. D at 32a) are unreported.

Additionally, the United States District Court for the Eastern District of California issued a number of officially and unofficially reported opinions and orders in this case. Its memorandum and order granting Petitioners' petition for an award pursuant to 42 U.S.C. § 1988 is reported at 177 F. Supp. 2d 1079 (E.D. Cal. 2001). Its denial of Respondent CSEA's first summary judgment motion is unofficially reported at 2000 WL 33599094 (E.D. Cal. 2000). Its memorandum and order denying Petitioners' second motion for a preliminary injunction is unofficially reported at 2000 WL 33599092 (E.D. Cal. 2000). Its memorandum and order granting Petitioners' motions for a preliminary injunction and for class certification is unofficially reported at 163 L.R.R.M. (BNA) 2086 (E.D. Cal. 1999).

JURISDICTION

The Court of Appeals entered its judgment on 9 January 2003. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III, and the First and Fourteenth Amendments, of the United States Constitution, Title I of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and §§ 3513(k) and 3515 of the California Government Code. Their pertinent text is set out in Appendices F-K at 57a-62a.

STATEMENT OF THE CASE

This case involves the Ninth Circuit's decision shielding public officials from liability when they act in concert with a labor union to deprive public employees of their constitutional rights for that union's financial benefit. Further, it involves the appropriate remedy when a government and a union defy "the constitutional requirements for the . . . collection of agency fees." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

This civil rights action, brought pursuant to Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, sought and obtained relief to prevent and redress violations of the constitutional rights of Petitioners and the class they represent ("the employees")[1] to be free from unlawful seizures of compulsory union fees. 475 U.S. at 306-10. Applying *Hudson*, the lower courts determined that Respondent California State Employees Association, Local

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[1] The class numbers approximately 37,000 State employees subjected to agency fee seizures after 2 March 1999. *Cummings v. Connell*, 163 L.R.R.M. (BNA) 2086, 2095 (E.D. Cal. 1999).

1000, Service Employees International Union, AFL-CIO-CLC ("CSEA"), failed to comply fully with *Hudson*'s "constitutional requirements," *id.* at 310, until after Respondent Kathleen Connell, California State Controller, had seized and forwarded to CSEA approximately $14.2 million from the employees' wages over a period of thirteen months.

As part of their lawsuit, the employees sought judgment that Connell violated their constitutional rights by seizing fees for CSEA's benefit, and challenged indemnification provisions of the various collective bargaining agreements ("CBAs") negotiated by Respondent Marty Morgenstern with CSEA, alleging that they are void as against public policy and unenforceable. R. 1, ¶¶ 22 & 55. Both lower courts declined to address that challenge, declaring that the employees lack standing to challenge such a section of the CBAs governing their terms and conditions of employment. *See* App. A at 21a; App. E at 51a-55a. The Ninth Circuit also affirmed the District Court's refusal to enter judgment against Connell and Morgenstern, holding that "a public sector employer who deducts 'fair share' fees from an employee's paycheck is not liable if the union fails to provide adequate notice under *Hudson*." App. A at 18a.

The District Court awarded to the employees that portion of agency fees denominated "nonchargeable" by CSEA, approximately $3 million of the $14.2 million seized from them before CSEA complied with *Hudson*'s requirements. App. E at 45a-46a; App. C at 30a. Reversing, the Ninth Circuit declared that CSEA—which did not comply with *Hudson*'s requirements until after thirteen months of fee seizures—was entitled to collect and use agency fees involuntarily seized by the State on its behalf from public employees' wages, because, albeit tardily (*i.e.*, after being hailed into court and subjected to preliminary injunctive relief), it complied fully with *Hudson*'s disclosure mandates. App. A at

11a-15a. The Ninth Circuit—declaring CSEA's "good faith," exhibited only after the District Court's intervention and eight months of fee seizures—held that the employees were entitled to **no** monetary award unless they objected pursuant to CSEA's untimely notice. App. A at 15a.

I. The Facts.

The employees are nonunion employees of the State of California in nine bargaining units. CSEA is an "employee organization" recognized as their monopoly bargaining representative pursuant to State law. Cal. Gov't Code § 3513(a). CBAs governing each bargaining unit are negotiated and administered on behalf of the State by Morgenstern. App. E at 34a. Since March 1999, these CBAs have subjected employees who do not join CSEA to involuntary seizures—made by Connell—of "agency fees" from their wages, for CSEA's benefit. App. E at 34a; *see* Cal. Gov't Code, §§ 3513(k) & 3515. CSEA agreed in the forced-unionism section of each CBA to indemnify "the State and its agents . . . against any claims made of any nature and against any suit instituted against the State arising from this Article and the deductions arising therefrom." R. 125, ¶ 22.

Beginning in April 1999, Connell began seizing agency fees from the wages of each nonunion employee, continuing to date such fee seizures on a monthly basis. Constitutionally-adequate notice and procedures under *Hudson* were not provided to the employees until May 2000. App. C at 25a.

II. The Proceedings Below.

The employees filed their civil rights lawsuit on 2 November 1999, seeking declaratory and injunctive relief, and damages, on the grounds that Respondents were enforcing their "agency shop" scheme in violation of *Hudson*. The Complaint also alleged that the CBAs' indemnification provisions are void as against public

policy. Shortly thereafter, the District Court enjoined CSEA "from collecting a fair share agency fee," because the employees had raised "serious questions going to the merits" as to CSEA's failure to include an auditor's report in its then-effective notice. The District Court certified Petitioners as representatives of the class of all "potential objectors" under *Hudson*. *Cummings*, 163 L.R.R.M. (BNA) at 2093, 2095; *see Hudson*, 475 U.S. at 306.

More than eight months after the first fee seizures, and more than two months after suit was filed, but within days of the setting and posting of the injunction bond, R. 33 & 40, Connell distributed CSEA's annual audit (but no explanation of its procedures for objection). Respondents simultaneously filed *ex parte* applications seeking dissolution or clarification of the injunction. R. 34-38. The employees opposed. R. 46. When the District Court deemed the injunction's conditions satisfied, they sought a new temporary restraining order and/or a preliminary injunction. R. 43-45. Both were denied. R. 48 & 69.

CSEA issued separate notices in May and June 2000. The May notice purportedly applied to fee seizures occurring over the preceding thirteen months; the June notice was to apply to subsequent fee seizures. Shortly thereafter, CSEA sought summary judgment. R. 73. The employees opposed, pending completion of discovery. R. 85 & 94. Upon its completion, all parties moved for summary judgment. R. 112-128 & 132-158. The District Court entered its Order and Judgment on 2 May 2001, granting and denying the motions in part, and determining that the May and June 2000 notices finally and fully complied with *Hudson*'s requirements. App. D at 32a; App. E at 55a.

The District Court found the four CSEA notices distributed before May 2000 constitutionally infirm. The April and June 1999 notices "did not adequately explain the basis for the fee," because they "failed to provide a copy of the Audit in the absence

of a fee payer's formal request." App. E at 38a. The two notices issued in January 2000 were inadequate because the first "did not provide [employees] with a reasonable opportunity to object," *id.* at 40a, while the second explained CSEA's objection procedure without including financial disclosure. *Id.* at 42a.

Judgment was entered, App. D at 32a, awarding declaratory relief and damages against CSEA, directing refund of nonchargeable fee portions to all nonmembers, but denying restitution of the balance of the fees seized before compliance with *Hudson*'s "constitutional requirements." 475 U.S. at 310. App. E at 45a-46a. The District Court also held that its "award of partial restitution leaves no injury that is redressable against defendants Connell and Morgestern" and that the employees lacked standing to challenge the CBAs' indemnification agreements. *Id.* at 36a n.3 & 51a-55a.

CSEA filed separate motions: (1) to alter or amend the judgment or, in the alternative, for relief from judgment, R. 165; and (2) for relief from judgment. R. 171. The District Court issued a decision, App. C at 24a-31a, and an amended Judgment, App. B at 23a, on 31 July 2001. CSEA timely appealed, R. 182, and the employees timely cross-appealed. R. 185.

In their cross-appeal, the employees unsuccessfully sought reversal of the District Court's: (1) ruling that the employees lack standing to challenge the indemnification clauses in the CBAs; (2) refusal to enter judgment against Connell and Morgenstern; and (3) denial of full restitution. CSEA successfully sought reversal of the District Court's limited award of partial restitution of the nonchargeable portion of the seized fees.

Applying *Foster v. Mahdesian,* 268 F.3d 689, 694 (9th Cir. 2001), *cert. denied sub nom. Foster v. Garcy,* — U.S. —, 122 S. Ct. 2327 (2002), the panel ruled Connell virtually immune from

liability for her "routine collection of fees," declaring "not significant" her distribution of CSEA's constitutionally-inadequate notices. The panel also expressed serious skepticism as to Morgenstern's exposure. App. A at 18a-19a.[2] It then applied *Prescott v. County of El Dorado ("Prescott III")*, 298 F.3d 844, 846 (9th Cir. 2002), *cert. denied* — U.S. —, 123 S. Ct. 1251 (2003), to hold that the employees "lack standing to challenge . . . indemnification clauses" in the CBAs. App. A at 21a.

The panel also denied the employees' request for full restitution of fees seized prior to Respondents' compliance with *Hudson*'s requirements, declaring it foreclosed by *Prescott v. County of El Dorado ("Prescott I")*, 177 F.3d 1102, 1109-10 (9th Cir. 1999), *cert. granted, vacated, & remanded on other grounds*, 528 U.S. 1111 (2000), *reinstated in pertinent part* ("*Prescott II*"), 204 F.3d 984 (9th Cir. 2000). In addition, the panel reversed the District Court's award of partial restitution of the nonchargeable portions of the fee, App. E at 45a-46a, applying private-sector decisions under the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.*; *see also Communications Workers of America v. Beck*, 487 U.S. 735 (1988). App. A at 11a-15a. Declaring that it "fail[s] to see how plaintiffs suffered any compensable harm (aside from nominal damages) from the initial defective notice," the panel found a notice issued thirteen months after the first fee seizures "adequate to renew the burden on the plaintiffs to object." It declared "overbroad" the limited remedy denying to CSEA only monies spent on political, ideological, and other non-bargaining activities. *Id.* at 15a.

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[2] Obviously, Morgenstern's participation was necessary to obtain appropriate relief as to the CBA's indemnification provisions, to-wit: declaratory judgment that they are void as against public policy; an injunction against their negotiation and enforcement; and their expunction from existing State/CSEA CBAs. R. 1: Complaint, ¶ 55.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT QUESTIONS AS TO EMPLOYER LIABILITY AND EMPLOYEE STANDING DIRECTLY ADDRESS INDIVIDUALS' ABILITY TO PROTECT THEMSELVES AGAINST GOVERNMENT'S IMPOSITION OF UNLAWFUL TERMS AND CONDITIONS OF EMPLOYMENT.

The decision below on the first three questions presented, based upon other recent Ninth Circuit decisions, rejects this Court's well-established jurisprudence regarding public official liability under 42 U.S.C. § 1983, generally, and in the context of public-sector forced-unionism, particularly.

The panel declared Connell's "routine collection of agency fees" to be virtually immune from judicial scrutiny, App. A at 18a, quoting *Foster*, 268 F.3d at 693, because it "does not trigger a duty . . . to ensure that every employee has received a proper *Hudson* notice." 268 F.3d at 693. But the panel disregards this Court's admonition that "the government and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights" by compliance with "the constitutional requirements for the . . . collection of agency fees. *Hudson*, 475 U.S. at 307 n.20 & 310. More importantly, the panel begs the important question of a public official's appropriate response when *Hudson*'s standards are ignored, or defied.

The flaw in the panel's conclusion arises from the unstated premise underlying Ninth Circuit decisionmaking on this issue: that monopoly bargaining representatives possess some inchoate claim against a portion of nonmembers' wages. This premise confuses political argument with sound legal principle.

This Court's decisionmaking is to the contrary. The monopoly bargaining privilege is statutory. Unions possess no

entitlement or authority to bargain exclusively or collectively with a public employer. *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283, 286-88 (1976). Likewise, the authority to compel nonmembers' support of a union is a statutory privilege, not an inchoate right inherent in the monopoly bargaining privilege. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223-25 (1977) (explaining governmental interests justifying allowance of agency shop). Two conditions precedent—statutory and contractual[3]—must be satisfied before forced dues may be exacted from nonunion public employees. This Court in *Hudson* added a third category of conditions: "the constitutional requirements for the . . . **collection** of agency fees." 475 U.S. at 310 (emphasis added). Absent satisfaction of all of these requirements—including the last—there is no authority to exact monies from nonunion public employees.

The Ninth Circuit's grant of immunity to public officials, App. A at 18a, quoting *Foster*, 268 F.3d at 693, is of a piece with its determination that employees lack standing to challenge one of the terms and conditions of the CBA governing their employment (here, the indemnification provision).

This Court frequently addresses standing questions. *See, i.e.*, *Clinton v. City of New York*, 524 U.S. 417 (1998); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Los Angeles v. Lyons*, 461 U.S. 95 (1983). In these cases, among many others, this Court has repeated the tripartite showing required to establish standing: "A plaintiff must allege [1] personal injury [2] fairly traceable to the defendant's allegedly

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[3] Cal. Gov't Code § 3513(k), App. J at 61a, permits forced-unionism clauses, but does not require them. *See also* 29 U.S.C. § 158(a)(3) (same); 45 U.S.C. § 152, Eleventh (same).

unlawful conduct and [3] likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751 (citing *Valley Forge Christian Coll. v. Americans United*, 454 U.S. 464, 471-76 (1982)).

By misdefining the employees' injury, the Ninth Circuit has written out of civil rights law government officials' liability, rendering nonexistent any meaningful duty to refrain from violating nonunion public employees' constitutional rights. This result ignores this Court's clearly-enunciated standards, *see Hudson*, 475 U.S. at 307 n.20 ("the government and union have a responsibility"), as well as those of virtually every other Circuit addressing this issue. Consequently, the employees face the prospect of future violations of their constitutional rights by both illegal agency fee seizures absent compliance with the "constitutional requirements for the . . . collection of agency fees," *id.* at 310, and by compelled subsidization of the public employer's defense against their successful lawsuit challenging past violations of their constitutional rights.

A. The Conflict with Decisions on the Injury-in-Fact Inflicted by Government Enforcement of Forced-Unionism Schemes.

The panel's decision conflicts with this Court's standing decisions, because it conflicts with this Court's forced-unionism jurisprudence. Although nonunion employees are injured by the public employer's seizure of agency fees from their wages, the Ninth Circuit has radically abstracted their injury, attributing their "injury in fact" to inadequate notice under *Hudson*. *Prescott III*, 298 F.3d at 845. Like the panel in *Prescott III*, the panel here premised its decision on the untenable proposition that the contents of a union's notice—rather than Connell's seizure of their property—injures employees.

The Ninth Circuit has applied this analysis in a series of cases, beginning with its first *Prescott* decision, 177 F.3d at 1111-12, culminating in its decision on remand. 298 F.3d at 846; *see Foster*, 268 F.3d at 694; *Harik v. California Teachers Ass'n*, 298 F.3d 863, 870 (9th Cir. 2002) (reversing judgment against public officials for seizing fees absent *Hudson* compliance).

The panel's conclusion defies this Court's mandate that a public employer has responsibility, before it seizes fees from "potential objectors," to ensure that *Hudson*'s standards are satisfied. *Hudson*, 475 U.S. at 306-07 & n.20; *see also Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997) (miscast by both the *Foster* and the *Prescott III* panels).

1. The Conflict with This Court.

Hudson holds that an employer's seizure, not the union's expenditure, of nonmembers' fees is the constitutionally-injurious act. Proceeding from the principle "that requiring nonunion employees to support their collective-bargaining representative 'has an impact upon their First Amendment interests,'" this Court identified the constitutional infringement in any forced-unionism scheme. *Hudson*, 475 U.S. at 301, quoting *Abood*, 431 U.S. at 222. Holding that "the agency shop itself impinges on the nonunion employees' First Amendment interests," this Court required an "appropriately justified advance reduction" of the fee. 475 U.S. at 309. That it is the taking of their property which injures the nonmembers' constitutional rights was cemented by this Court's holding establishing "the constitutional requirements for the . . . **collection** of agency fees." *Id.* at 310 (emphasis added); *cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") .

While declining to consider the case "through the prism of the procedural due process protections necessary for deprivations of property," this Court recognized that the infringement is dual, because "the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13. It therefore rejected the union's argument that escrow of all monies seized addresses "any valid constitutional objection to [its] procedure." *Id.* at 309; *see also ALPA v. Miller*, 523 U.S. 866, 876 n.4 (1998) (rejecting *amicus*' argument that "[i]llegality depends on the *spending* of compelled agency fees for ideological purposes . . . not simply the initial collection of those fees") (original emphasis).

Furthermore, the Ninth Circuit's rejection of public official liability disregards the government's duty to refrain from unconstitutional conduct, and government culpability for its unconstitutional seizure of "agency fees" from nonunion public employees. This Court unambiguously declared in *Hudson* that "the **government** and union" share "responsibility" when they enter into and enforce a forced-unionism provision, 475 U.S. at 307 n.20 (emphasis added). Nevertheless, another Ninth Circuit panel—relied upon by the panel below, App. A at 21a—discarded that conclusive affirmance of **government** responsibility in favor of a construction of § 1983 embracing the proposition that "the routine deduction of fees by the [government] employer," does not injure employees when the necessary notice and procedural protections have not been provided. *Foster*, 268 F.3d at 694.

As in *Prescott* and *Foster*, the panel elevated state statutory policy ostensibly favoring agency fee seizures, *id.*, over the federal constitutional policy barring fee seizures absent compliance with *Hudson*.

Distribution of an inadequate *Hudson* notice is not what injures employees, as the Ninth Circuit assumes. *Prescott III*, 298

F.3d at 846. Rather, nonmembers are injured by the seizure of agency fees, an act committed solely by the public employer and/or its officials (here, by Connell). The Ninth Circuit's refusal to acknowledge this point underlies its peculiar views as to standing: "The challenged indemnification clause upon which the employer insisted caused neither the union to furnish, nor the plaintiffs to receive, inadequate notice." *Id.* The Ninth Circuit refuses to acknowledge that the indemnification clause immunizes public officials against the consequences of their actions causing constitutional harm, *i.e.*, seizing agency fees from the employees' wages.

Having miscast the "injury" suffered by the employees from whom forced union dues are seized, the Ninth Circuit consequently ignores the palpable and direct effect of the indemnification agreement in the seizure of agency fees. Moreover, the court ignores the real and imminent prospect of **additional** financial injury (beyond the past illegal seizures of agency fees), insofar as the employees remain subject to the CBAs, and the prospect that CSEA will treat its expenses in indemnifying public officials as chargeable to nonmembers.

This Court has consistently recognized the First Amendment repercussions of forced-unionism schemes. *Hudson*, 475 U.S. at 301 (quoting *Abood*, 431 U.S. at 222); *see also Abood*, 431 U.S. at 255 (Powell, J., concurring); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 517-19 (1991); *see also Ellis v. Railway Clerks*, 466 U.S. 435, 447, 455-56 (1984) ("by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights"; "[t]he First Amendment does limit the uses to which the union can put funds obtained from dissenting employees"). The coerced subsidization imposed by indemnification provisions in cases such as this serves no legitimate governmental interest, but seriously "impact[s]" the employees' First

Amendment rights. *Hudson*, 475 U.S. at 301; *cf.* 42 U.S.C. § 1988 (fee-shifting provisions).

When it adopted the "injury-because-*Hudson*-was-not-followed" reasoning in *Prescott III*, 298 F.3d at 845-46, the Ninth Circuit ignored the tangible prospect of the employees' economic injury in CSEA's promise to indemnify Connell and Morgenstern for the costs of their defense of this lawsuit. The CBAs thus add to the injury of Connell's unlawful seizure of agency fees the insult of requiring the employees to subsidize Connell's financial liability for that injury. Certainly, the prospect of that injury is sufficient to confer upon the employees standing to challenge the legality of the indemnification agreement. *Lyons*, 461 U.S. at 111.

2. The Conflict Among the Courts.

The Ninth Circuit's decision conflicts with decisions of four other Circuits,[4] and one state supreme court, which have held public employers liable for seizing agency fees absent compliance with *Hudson*'s requirements. No other Circuit has adopted the Ninth Circuit's view.

A public employer's duty to refrain from inflicting constitutional harm by seizing fees is unanimously recognized in the Third, Sixth, Seventh, and Tenth Circuits, the only other Circuits to consider the question. *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1197-99 (10th Cir. 2002) ("That a public employer has certain obligations within the fair share deduction framework established by courts is beyond dispute"); *Hohe v.*

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[4] There is good cause to believe that it defies existing Ninth Circuit precedent, since the public employer's responsibility was previously recognized in *Knight*, 131 F.3d at 817, based upon *Hudson*, 475 U.S. at 307 n.20.

Casey, 956 F.2d 399, 405-06, 411 (3d Cir. 1992) ("the employer and the union must have a constitutional procedure in place before deducting fees"); *Tierney v. City of Toledo*, 824 F.2d 1497, 1504, 1507 (6th Cir. 1987) ("no . . . employer may take any action to enforce a . . . duty to pay any dues, . . . through a deduction from wages," absent *Hudson* compliance); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1538 (6th Cir. 1992) ("a public employer ha[s] duties separate and apart from those of the union"); *Hudson v. Teachers Local No. 1*, 743 F.2d 1187, 1191 (7th Cir. 1984) (public agency liable), *aff'd*, 475 U.S. 292 (1986); *see also Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987) (*Hudson* "mandated that the unions and government use a narrowly drawn plan that protects the nonmembers' first amendment interests"). Likewise, the Supreme Judicial Court of Massachusetts recognizes that "an employer cannot ignore an employee's assertion of a constitutionally protected right which is valid on its face." *Conley v. Massachusetts Bay Transp. Auth.*, 405 Mass. 168, 177 (1989).

This Court should grant *certiorari* to address the Ninth Circuit's deviation from this Court's jurisprudence, and that of virtually every other court, as to the injury-in-fact suffered by nonunion employees subject to the diminution of their compensation resulting from public officials' enforcement of forced-unionism schemes, and as to public officials' liability when they act in league with a labor union to enforce such a requirement.

B. The Conflict with "Standing" Decisions.

1. The Conflict with This Court.

Insofar as the employees seek prospective declaratory and injunctive relief that Respondents' indemnification scheme is void as against public policy, the Ninth Circuit failed to analyze properly the employees' standing under *Lyons*. *Lyons* holds that

litigants seeking such relief demonstrate standing when they show a "real or immediate threat that [they] will be wronged again—a 'likelihood of substantial and immediate irreparable injury.'" 461 U.S. at 111 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). The employees in the bargaining units remain subject to the CBAs' forced-unionism provisions, and satisfy these requirements. Nevertheless, because "[t]he remedy the plaintiffs seek, invalidation of the indemnification clause, does not compensate plaintiffs for past violations of *Hudson,* nor does it prevent future violations," as it wrongly defines them, the Ninth Circuit has declared that the employees failed to meet "the redressability requirement for standing." *Prescott III*, 298 F.3d at 846.

The Second Circuit struck down a similar indemnification provision in *Stamford Board of Education v. Stamford Education Association*, 697 F.2d 70, 74 (2d Cir. 1982), citing the union's payment of the public employer's liability for damages for entering into an unlawful agreement and the derivation of that payment from, "at least in part, funds collected as dues from the plaintiffs themselves or from members of the plaintiff class." *Id.* (citing *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir. 1976) (union may not bargain away minority employees' right to equal treatment)). Similarly, the employees here face the very real prospect of subsidizing the opposition to their own lawsuit, if CSEA indemnifies Connell and Morgenstern and charges bargaining unit employees for those costs. *See also Clinton*, 524 U.S. at 429-30. Rejecting the argument that there was no "actual injury [to the City] because the claims are too speculative," this Court in *Clinton* compared a President's exercise of his authority to setting aside a defense verdict on appeal, with remand for a new trial of a multibillion dollar damage claim: "[e]ven if the outcome of the second trial is speculative, the reversal, like the President's cancellation, causes a significant immediate injury by depriving the defendant of the benefit of a

favorable final judgment." *Clinton*, 524 U.S. at 429-30 (allowing challenge to the Line Item Veto Act, 2 U.S.C. § 691 *et seq.*)

The courts below were presented with the fact that an indemnification provision necessarily lowers indemnitees' exposure, thereby creating disincentives to the public officials' protection of the employees' constitutional rights. If "denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result," 524 U.S. at 433 n.22 (citing *Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993)), then certainly achievement of a term in the bargaining process likewise inflicts an Article III injury.[5]

2. The Conflict Among the Circuits.

In addition to the Ninth Circuit in this case, three other courts of appeals have addressed indemnification in the context of forced-unionism agreements. *See Wessel*, 299 F.3d at 1197-99 (Tenth); *Weaver*, 970 F.2d at 1536-38 (Sixth); *Hohe*, 956 F.2d at 411-12 (Third); *see also Knight*, 131 F.3d at 817 (Ninth; addressing similar merits challenge to indemnification provi-

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[5] The employees need not demonstrate that Connell would have eschewed fee seizures absent the indemnification provision to establish their standing. This Court has repeatedly refused to impose such a requirement. *Jacksonville*, 508 U.S. at 664-65 (citing *Turner v. Fouche*, 396 U.S. 346, 361 (1970)); *see also Clements v. Fashing*, 457 U.S. 957 (1982) (dispute not "merely hypothetical" because litigants could not show they would have been elected but for "automatic resignation" provisions of Texas state constitution); *Regents of University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (requisite injury shown by refusal of state to allow litigant to compete for benefit sought).

sions).[6] None has eluded the merits by adopting the position of *Prescott III*, followed by the panel below.

Most recently, in *Wessel*, the Tenth Circuit specifically criticized and rejected the Ninth Circuit's approach in *Prescott I*, 177 F.3d at 1112. There, the court referred to the Ninth Circuit's erroneous identification of the injury, noting that:

> [t]he alleged injury results from the indemnification provision's negation of any incentive for the City to ensure that the *Hudson* requirements were followed. The nonmembers' entire argument presumes that, if the City faced potential liability, it would have prevented the fair share fees from being deducted unconstitutionally from the nonmembers' paychecks.

299 F.3d at 1199 n.3.

The Third Circuit addressed a similar challenge in *Hohe*, 956 F.2d at 411-12. There, the district court rejected the challenge on standing grounds. In a footnote to a simultaneous rejection on standing grounds of the challenge to the facial validity of a statute requiring fee seizures absent *Hudson* compliance, the court stated that, "[f]or the same reasons we also reach that conclusion with respect to the indemnification clause in the [CBA]." *Hohe v. Casey*, 740 F. Supp. 1092, 1098-99 & n.5 (M.D. Pa. 1989), *rev'd in pertinent part*, 956 F.2d 399, 412 (3d Cir. 1992).

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[6] The district court in *Knight* "quickly disposed of" an identical challenge to nonunion employees' standing. Petition for a Writ of *Certiorari*, *Anchorage Educ. Ass'n v. Patterson*, No. 97-1454, App. C at 47a. However, perhaps recognizing *Knight*'s conclusion, *Prescott III* views *Knight* through the prism of *Foster*, which declared that the seizure of fees is not an "adverse action" under *Knight*, 131 F.3d at 817. *Foster*, 268 F.3d at 694.

On appeal, the *Hohe* nonmembers argued that the indemnification clause "is void as against public policy." 956 F.2d at 411. The Third Circuit explicitly held that employees subject to a monopoly bargaining agreement possess standing to challenge its terms: "We find ourselves in disagreement with the ruling of the district court that it need not decide this issue. We say so because we think the theory advanced by the plaintiffs' attack on the clause raises a cognizable legal issue." *Id.* at 412.

The Sixth Circuit in *Weaver* likewise addressed the merits in a challenge to an indemnification clause, in a discussion devoid of any suggestion that employees lack standing. 970 F.2d at 1536-38; *see also Cramer v. Matish*, 924 F.2d 1057 (table), 1990 WL 169640 (6th Cir. 1990) (same). The court found it sufficient that the clause "protect[s] the University from any financial consequences of going along with procedures selected by the union that fail to comply with the constitutional standards enunciated in *Hudson*." 970 F.2d at 1538.

Any federal court's merits judgment presupposes determination that the parties possess the requisite standing. *National Org. for Women v. Scheidler*, 510 U.S. 249, 255 (1994) (standing is open to review at all stages of the litigation); *cf. Brewer v. Lewis*, 989 F.2d 1021, 1025 (9th Cir. 1993) (standing is a jurisdictional question that must be addressed at threshold of any case). It is "an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. When a party lacks standing, there is no case or controversy, and the court lacks jurisdiction. As this Court recently reaffirmed, "'Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)); *see also National Law Center on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 180 (D.C. Cir. 1996). Thus, implicit in the

Sixth Circuit's merits determination in *Weaver* is the conclusion that it possessed jurisdiction to decide the issue presented to it.

This Court should grant *certiorari* to settle the conflict among the circuits as to whether employees subject to a forced-unionism provision possess standing to challenge the legality of an indemnification clause in that agreement.

II. THERE IS WIDESPREAD CONFLICT AMONG THE CIRCUITS AS TO WHETHER UNIONS MAY INDEMNIFY PUBLIC OFFICIALS FOR ILLEGALLY ENFORCING FORCED-UNIONISM AGREEMENTS.

Like this case, *Hudson* was brought pursuant to 42 U.S.C. § 1983. 475 U.S. at 298 n.3. *Hudson* addressed "whether the [agency shop] procedure used by [a union] and approved by [a public employer] adequately protects the basic distinction drawn in *Abood*" between "'devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" *Id.* at 302 (quoting *Abood*, 431 U.S. at 237). "[A]nalyz[ing] the problem from the perspective of the First Amendment concerns," 475 U.S. at 304 n.13, this Court set forth three "constitutional requirements for the . . . collection of agency fees." *Id.* at 310. The Court specifically stated that, in this context, both "**the government** and union have a responsibility to provide procedures that minimize that impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20 (emphasis added).

Under this articulation of government responsibility, public officials may not, without violating constitutional norms, seize agency fees from nonmember employees on behalf of a union absent strict adherence to these "constitutional requirements." *Id.*

at 310. Doing so injures the employees. Nevertheless, the Ninth Circuit has rejected this Court's decisionmaking here, App. A at 19a, and in three other cases that write government liability out of § 1983 law. *Prescott III*, 298 F.3d at 846; *Foster*, 268 F.3d at 694; *Harik*, 298 F.3d at 870.

Section 1983 creates a remedy "against those who representing a State in some capacity were ***unable*** or ***unwilling*** to enforce a state law," *Monroe v. Pape*, 365 U.S. 167, 176 (1961) (original emphasis); *see also District of Columbia v. Carter*, 409 U.S. 418, 426 (1973), with the purpose of "protect[ing] the people from unconstitutional action under color of state law 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)); *see generally* 1A Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims and Defenses* § 1.3 (3d ed. 1997).

Thus, state and local governments bear non-delegable responsibility for their "constitutional torts." 42 U.S.C. §§ 1983, 1988. The purpose of § 1983 is "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978)); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (deterrence of future abuses of power is an important purpose of this section). Similar purpose is implicit in the fee-shifting provisions of § 1988.

The courts of appeals are in deep conflict over whether labor unions may agree to indemnify public officials against any liability arising out of the unlawful enforcement of forced-unionism provisions. The Ninth Circuit has four times eluded this issue, but four other circuits have confronted it, three in this specific context.

Only the Third Circuit has found such agreements permissible. *Hohe*, 956 F.2d at 411-12. When the Third Circuit addressed this controversial issue, the Second Circuit had already addressed it in another context, *Stamford*, 697 F.2d at 73-75, and the Sixth Circuit already had addressed it in this context in its unpublished *Cramer* opinion. *Cramer* held an indemnification provision void as against public policy because, "[u]nder *Hudson*, the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid." "[C]lauses in [CBAs] which purport to relieve public employers from liability for violations of federal constitutional and civil rights are void as against public policy." *Cramer*, 1990 WL 169640, at *4 (following *Stamford*). *Cramer* concluded that, "[w]ithout such a role, public employe[r]s would have **no incentive** to fulfill their constitutional duties." *Id.* (emphasis added).

The Third Circuit declined to follow *Stamford* and *Cramer*. *Hohe*, 956 F.2d at 411 (citing *Cramer* and others). Shortly after *Hohe*, the Sixth Circuit addressed the issue again, in *Weaver*. *Weaver* found *Stamford*'s reasoning more persuasive than *Hohe*'s, declaring that "the indemnification agreement . . . was repugnant to public policy, and therefore, invalid," for two reasons. First, the clause "protect[s] the university from any financial consequences of going along with procedures selected by the union that fail to comply with the constitutional standards enunciated in *Hudson*." Second, the court recognized that "the university as a public employer had duties separate and apart from those of the union." *Weaver*, 970 F.2d at 1538 (citations omitted). The Sixth Circuit concluded that a "clause that relieves the employer of all consequences for its failure to assume and conscientiously carry out its duties, including even the cost of defending legal actions, is against public policy." *Id.*

Most recently, the Tenth Circuit in *Wessel* adopted the majority view that indemnification clauses in this context are void as against public policy. *Wessel* rejected the assertion that a public employer can "do little, if anything, to detect and prevent" *Hudson* violations. 299 F.3d at 1197. *Wessel* concluded that "if the Supreme Court had only been concerned with the union's ability to carry out the *Hudson* requirements, it would not have placed the burden on both parties." *Id.* at 1198 (citing *Hudson*, 475 U.S. at 307 n.20).

III. The Important Question as to the Appropriate Remedy Directly Addresses the Continued Vitality of *Hudson*'s Protections.

A. The Conflict with *Hudson*.

While *Hudson* declined to specify the appropriate remedy, implicit in its holding is the conclusion that failure to comply with the "constitutional requirements" means that a union may not "collect[]" fees. 475 U.S. at 310. In contrast, the Ninth Circuit's reversal of the award of partial restitution is premised upon the concept that agency fee seizures absent *Hudson* compliance can be "cured" by post-seizure notice and procedures. Both theoretical and practical considerations doom this concept.

First, a subsequent notice cannot, by hypothesis, "cure" failure to provide notice, since a notice requirement inherently presupposes a temporal component.[7] *Hudson* imposes this

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[7] For this reason, in part, this Court rejected similar arguments, holding that violators cannot escape liability by issuing the notice adequate as to its content and procedures after being sued. *Hudson*, 475 U.S. at 305 n.14 ("we consider the procedure as it was presented to the District Court"); *see also Knight*, 131 F.3d at 811-12, 814-15 (reversing two district court decisions deeming "moot" nonmembers' claims about an illegal demand for payment of agency fees).

component with its declaration of "the constitutional requirements for the . . . **collection** of agency fees," thus mandating that adequate notice and procedures **precede** agency fee seizures. *Id.* (emphasis added); *see also id.* at 305, quoting *Abood*, 431 U.S. at 244 (Stevens, J., concurring) (reaffirming principle that "'the Union should not be permitted to **exact** a service fee from nonmembers without **first** establishing a procedure'") (emphasis added). Thus, the Court mandated an "advance reduction of dues" presupposing pre-seizure calculation and notice. 475 U.S. at 304, 306, 309 (three references); *see also id.* at 305-06 ("A forced exaction followed by a rebate equal to the amount improperly expended is . . . not a permissible response to the nonunion employees' objections").

This conclusion is confirmed by *Hudson*'s context as a limited exception to the rule that an "essential principle of due process is that a deprivation of life, liberty, or property 'be **preceded** by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). This is the normal constitutional principle: "'the root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Loudermill*, 470 U.S. at 542 (original emphasis), quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

Coupled with the content-based regulation of speech that is the imposition of an "agency shop" and its consequent triggering of "strict scrutiny," *Hudson*'s requirements must be analyzed through the narrowest prism. The license for unions and public employers to seize public employees' property absent pre-seizure "opportunity for hearing" must be construed through its own strict limitations, which require adequate financial disclosure

calculating an "advance reduction of dues," subject to "verification by an independent auditor," 475 U.S. at 307 n.18, prior to any "collection of agency fees." *Id.* at 310. Thus, the notion that public-employee labor unions can "cure" failure to comply with *Hudson*'s requirements simply by issuing a new constitutionally-adequate notice when hailed into court by the employees whose rights have been violated by illegal fee seizures fails in light of this Court's First-Amendment jurisprudence.

Furthermore, this Court mandated that unions escrow "potential objectors" monies pending "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," in which "to have his objections addressed in an expeditious, fair, and objective manner." *Id.* Practically, a tardy notice can "cure" neither of these failures.[8] At most, such a belated notice can provide, tardily, the requisite financial disclosure. However, it cannot retroactively escrow—and therefore prevent the involuntary use of—monies "reasonably in dispute" or, here, render any review "reasonably prompt" in relation to the fee seizures. Thus, the Ninth Circuit's premise overlooks two important elements of *Hudson*'s mandate.

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[8] The Ninth Circuit has indicated that a four-to-five month delay is permissible. *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1372, 1377 (9th Cir. 1993). Other courts have held similar or longer delays to be impermissible. *Harrison v. Massachusetts Soc. of Professors*, 405 Mass. 56, 66 (1989) (Mass. 1989) (150-day delay impermissible); *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1091 (E.D. Cal. 1996) (year-long delay impermissible); *McGlumphy v. Fraternal Order of Police*, 633 F. Supp. 1074, 1083 (N.D. Ohio 1986) (year-long delay impermissible); *see also Perry v. Machinists Local 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983) (eighteen months before refund "cumbersome" and "unfair").

B. The Conflict Among the Courts.

The Circuits and state courts are deeply divided as to the appropriate monetary remedy when fees are seized in violation of *Hudson*. The Ninth Circuit's ruling on full restitution admittedly represents a majority view among the courts of appeals (one which disregards this Court's mandates, *see* § III(A), *supra*). However, its reversal of the award of partial restitution is a distinctly minority view, contrary to the views of other Circuits and courts, and even other panels within the Ninth Circuit.

Predicated upon a view of union entitlement to nonmembers' fees, three circuits and one state supreme court deem full restitution inappropriate when fees are seized in violation of *Hudson*'s "constitutional requirements." *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 432-33 (6th Cir. 1990); *Weaver*, 970 F.2d at 1533-34; *Gilpin v. AFSCME*, 875 F.2d 1310, 1313-14 (7th Cir. 1989); *Wessel*, 299 F.3d at 1194-95; *Browne v. Wisconsin Employment Relations Comm'n*, 169 Wis. 2d 79, 130-34 (1992); *cf. Prescott I*, 177 F.3d at 1109 (same).

On the other hand, three state supreme courts have affirmed awards of full restitution. *Elvin v. Oregon Pub. Employees Union*, 313 Or. 165, 176-80 (1992) (affirming administrative award); *Wareham Educ. Ass'n v. Massachusetts Labor Relations Comm'n*, 430 Mass. 81, 89-90 (1999) (granting restitution where no audit supplied); *Gibney v. Toledo Bd. of Educ.*, 40 Ohio. St. 3d 152, 157-58 (1988). Moreover, the Ninth Circuit has held that a union which "failed to satisfy *Hudson*'s requirements . . . was not entitled to the fees that it collected." *Knight*, 131 F.3d at 815;[9]

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[9] Like *Prescott I*, the panel declared that *Knight* "said the union was not entitled to the **full amount of** fees it collected." App. A at 12a (emphasis added). The emphasized words did not appear in *Knight*'s

(continued...)

see also Dean v. TWA, 924 F.2d 805, 809 (9th Cir. 1991) (under Railway Labor Act, nonmember is privileged to withhold dues demanded absent compliance with *Hudson*).

The panel's reversal of the District Court's damages award is a minority position. Two other circuits and a state supreme court denying full restitution have held that the minimally-appropriate damages remedy for collections absent *Hudson* compliance is the nonchargeable portion of the fee. *Lowary*, 903 F.2d at 432-33 (Sixth Circuit); *Weaver*, 970 F.2d at 1533-34 (same); *Wessel*, 299 F.3d at 1194-95 (Tenth Circuit); *Browne*, 169 Wis. 2d at 133 ("rights are sufficiently protected by requiring the unions to refund the excess amounts deducted, plus interest"). The panel's decision even conflicts with other Ninth Circuit panels in *Dean*, 924 F.2d at 809 (under RLA, without procedures in place, union "has no right . . . to collect fees for use in any union activity beyond collective bargaining"), *Prescott I*, 177 F.3d at 1109-10, and *Knight*, 131 F.3d at 815, as construed by *Prescott I*. For this reason, the Court should grant the Petition as to the important question presented on the appropriate monetary remedy for fees seized in violation of *Hudson*'s requirements.

IV. The Importance of the Issues Presented.

These questions manifestly are important, both in practice and principle, as this Court recognized by granting *certiorari* in cases such as *Ellis*, *Hudson*, *Beck*, *Lehnert*, *Miller*, and *Prescott*.

The questions are important in practice because their resolution will affect a large number of employees subject to

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[9] (...continued)
holding, which reversed "the district court['s] . . . holding that . . . Patterson was not entitled to a full refund of all collected fees as a remedy for the defective *Hudson* notice." *Knight*, 131 F.3d at 815.

public-sector forced-unionism agreements. Such agreements are lawful in at least twenty (20) states and the District of Columbia. Milton L. Chappell, *Seeking a New Foundation: Legislative and Practical Alternatives to the Current Monopoly Bargaining Model That Will Enhance the Viability of Independent Teacher Groups*, 16 Gov't Union Rev. 1, 23-28 (table) (Summer 1995). As the cases above illustrate, public employee unions frequently assume the employer's liability in order to obtain and enforce forced-unionism agreements.[10] Their sole purpose is to ensure that public employers seize fees notwithstanding union defiance of *Hudson*'s requirements. Resolution of the first three questions will affect the administration of such agreements nationwide.

Whether public officials are immune from liability when they seize agency fees, and whether public employers and officials may be indemnified by labor unions from liability for seizing fees is important in principle, too. Requiring public employees to support financially their monopoly bargaining representative implicates fundamental constitutional rights. *Hudson*, 475 U.S. at 301 n.3; *see also Ellis*, 466 U.S. at 455. Questions as to how the government's responsibility, 475 U.S. at 307 n.20, is to be enforced against government complicity in the efforts of discrete, locally-powerful groups to violate the constitutional rights of another discrete, less-politically powerful group, *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985), necessarily are important. Indeed, they are at the core of the congressional policy embodied in § 1983, which is to create a remedy "against those who representing a State in some capacity [a]re ***unable*** or ***unwilling*** to enforce a state law." *Monroe*, 365 U.S. at 175-76.

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[10] California's statute authorizing forced unionism for local public employees requires indemnification where the forced-fee requirement is imposed without a CBA. Cal. Gov't Code § 3502.5(b).

This Court's intervention is necessary to establish conclusively nationwide that public officials who surrender government employees' unfettered right to choose whether to support their monopoly bargaining representative cannot avoid their "responsibility" under *Hudson*, 475 U.S. at 307 n.20. It is necessary to guarantee that public officials cannot, without economic consequence and in league with a labor union, "subject, or cause[] to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

Also of compelling importance is determination of whether unions defying *Hudson* may nevertheless retain agency fees illegally collected from employees. Aside from the sheer magnitude of the amount at issue—nearly $3 million awarded by the District Court, out of more than $14 million seized—resolution of that question is necessary to determine whether *Hudson*'s protections have any meaningful and continuing vitality in the face of union intransigence and artful evasions. *Cf.* Jeff Canfield, *What a Sham(e): The Broken Beck System in the Real World Workplace*, 47 Wayne L. Rev. 1049, 1050 (Fall 2001) (arguing *Beck* as construed by unions and the National Labor Relations Board "makes it nearly impossible for average employees to successfully assert those rights granted by [this] Court").

The Ninth Circuit's denial of meaningful monetary damages is an invitation for public-sector unions to roll the dice, disregard or attempt to evade *Hudson* (which happened in this case) and take their chances against the improbable happenstance that their victims will sue. The Ninth Circuit has drawn public-sector unions a virtual roadmap for artful evasion of *Hudson*, where "good faith" is defined as doing as little as possible in response to suit, and only after federal injunctive relief is entered. App. A at 4a, 15a; App. E at 41a. Indeed, unavoidably implicit in the lower

courts' view that full restitution is somehow "unfair" is the conclusion that unions doing **nothing** to comply with *Hudson*'s mandate are nevertheless entitled to the chargeable portion of agency fees.

This case is a uniquely appropriate vehicle for addressing the remedial issue. Here, CSEA failed to comply with *Hudson*'s requirement to provide "verification by an independent auditor," 475 U.S. at 307 n.18, but cannot complain of the "burden" or expense of doing so. *See*, *e.g.*, *Harik*, 298 F.3d at 869. Rather, privileged to seize more than $1 million monthly from 37,000 employees, CSEA nevertheless simply refused to spend $12,000 (about 30¢ per employee) to provide them with audited financial disclosure it already possessed. R. 32.

CONCLUSION

For the reasons stated above, this petition for writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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